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*Kevin L Smith*

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**FRIEDLANDER, Judge**

Telematrix, LLC, employed John Louden, who was a key figure in Telematrix's work for its biggest client, Cummins, Inc. Louden worked closely with Cummins employee Bud Mantyla. Mantyla ultimately left Cummins to work for Techcom, which Mantyla hoped would replace Telematrix as the relevant service provider for Cummins, as will be explained more fully below. Eventually, Techcom hired Louden away from Telematrix and Mantyla's hopes were realized – Techcom replaced Telematrix as the relevant service provider for Cummins. In this appeal, Mantyla, Louden, and Techcom appeal a judgment in favor of Telematrix for money damages after the latter prevailed on the theories of breach of fiduciary duty and tortious interference with a business relationship with Cummins. The Appellants present the following consolidated and restated issues for review:

1. Did the trial court commit clear error in determining that Louden breached his fiduciary duties to Telematrix?
2. Did the trial court commit clear error in concluding that Mantyla and Techcom tortiously interfered with Telematrix's business relationship with Cummins?
3. Did the trial court err in awarding \$152,577.17 in damages to Telematrix?

We affirm.

In order to fully understand the relevant facts, we must first review the nature of the service that first Telematrix and later Techcom provided for Cummins. Cummins is a Columbus, Indiana business that produces engines. In the mid-1980s, Cummins transitioned from producing mechanical engines to producing electrical engines. This led to the development of a computer-based, interactive, self-study training program for Cummins personnel entitled the Cummins Interactive Learning Systems. This program was developed

by Cummins personnel under the leadership of Mantyla, who at that time worked for Cummins as the Director of Publication and Training. By the mid-1990s, that program became what was known as the Cummins Virtual College (the CVC). Originally, the program was delivered utilizing a twelve-inch videodisc hardware system that was operated by Cummins employees. With the advent of compact disc (CD) technology, Cummins determined by the early 1990s that CD technology would enhance Cummins's ability to deliver the CVC training programs to technicians around the world.

At that time, Telematrix was a closely held, limited liability company wholly owned by Montgomery Zuckerman Davis, Inc. (MZD). MZD had four owners – Robert and Delores Montgomery, Allan Zuckerman, and Harry Davis. Allan Zuckerman was MZD's Chairman and Chief Executive Officer. Telematrix hired Loudon as its Director of Engineering in 1985. Approximately ten years later, Loudon was promoted to Vice President of Operations for Telematrix. He remained in that position until he separated from Telematrix in June, 2005. By the time Loudon was hired in 1985, Cummins was already a major client of Telematrix. In 1995, Cummins selected Telematrix to produce its CVC training programs. Telematrix was also hired by Cummins to develop a software shell – an application of basic computer programming principles that would serve as the underlying basis for producing subsequent CVC projects. From 1996 until June 2005, Telematrix continued to produce CVC training courses for Cummins. While Telematrix was developing the CD-based CVC concept, Techcom continued to develop other aspects of Cummins's training programs that would eventually become obsolete because of the CD-based CVC concept. When Cummins

decided to fully convert to CDs, Techcom no longer had a role in the development of video training programs, although it did continue its work in the service training and technical publications area of Cummins's business.

Thomas Owens was Telematrix's primary contact person with the Cummins account. He remained in that position until he resigned in October 2003. In September 1998, Owens and Loudon became Class B, non-voting members of Telematrix. Pursuant to Telematrix's Amended Operating Agreement, which was prepared in conjunction with Owens and Loudon being added as members, the ownership shares of Telematrix were as follows: MZD – 92%, Owens – 5%, Loudon – 3%.

With the above as a backdrop, we turn now to the matters that culminated in the instant lawsuit. Through 2003, Mantyla was employed at Cummins and was that company's principal contact person with Telematrix concerning both operational and billing matters. Mantyla was also the person at Cummins who worked most closely with Telematrix concerning the CVC work that Telematrix performed for Cummins. In 2000, Mantyla conceived of a concept he dubbed "convergence". *Appellants' Brief* at 7. Convergence would bring both service publication and service training for the CVC under a unified, web-based system. As conceived, this would remove any barriers that separated those two sources of information. Mantyla had preliminary discussions on that subject with Pat Adams at Techcom and Owens at Telematrix. Mantyla believed that in order to make the convergence project work, "either the training supplier would have to move into the publication business or the publication supplier would have to move into the training business or risk the eventual

loss of business to an integrated third-party supplier.” *Appellants’ Appendix* at 287 (quoting the trial court’s Findings of Fact at 7). Under Mantyla’s direction, Cummins urged both Techcom and Telematrix to undertake exploratory discussions regarding the potential benefits of the convergence project.

Mantyla retired from Cummins in May 2003. By then, Cummins had become Telematrix’s largest client, and the largest part of Telematrix’s business with Cummins involved development of the CVC. Techcom hired Mantyla just two months later as its General Manager of Technical Publications. Meanwhile, Chris Crowel took Mantyla’s former position with Cummins as the primary contact person with Telematrix. In early August 2003, Mantyla contacted Crowel and told him that Techcom “was advertising a ‘whatever it takes’ approach in helping its customers reach their cost, quality and delivery targets.” *Appellee’s Appendix* at 31. In the same message, Mantyla invited Crowel to visit Techcom’s Columbus, Indiana office.

By the fall of 2003, Owens had been trying to persuade Zukerman for several years to sell Telematrix to him (Owens). Owens’s efforts proved unsuccessful. So, in November 2003, Owens, Telematrix’s General Manager and a member of the LLC, resigned. Shortly thereafter, MZD purchased Owens’s five-percent membership interest in Telematrix. Both Owens and Zukerman wanted Loudon to replace Owens as Telematrix’s General Manager, but Loudon declined. The position was offered to Jo Throckmorton, who accepted. Nevertheless, Loudon, not Throckmorton, was Telematrix’s primary contact person with Cummins. While these events transpired, Mantyla continued his efforts to persuade Crowel

to consider expanding Techcom's work for Cummins.

On January 28, 2004, Telematrix and Louden entered into an Intellectual Property Ownership, Confidential Information, Non-Disclosure, and Non-Adverse Use Agreement (the Agreement). In the Agreement, Louden acknowledged

“the following assets ... are the unique and valuable property of [Telematrix] and its clients and customers and have been acquired, developed or compiled by and for [Telematrix] at its significant expense and effort and represent ... confidential client information, and trade secrets of [Telematrix] and form an important part of [Telematrix's] assets, client base and goodwill:

- (a) Any and all intellectual property, including, but not limited to, literary and artistic material, photographs, video productions, sound recordings, broadcasts, software, electronic code, and multimedia, written prepared, compiled, produced, or otherwise created by [Louden] ...;
- (b) Information concerning clients and their business, accounts, networks and relationships;
- (c) The methods employed by [Telematrix] in the conduct of its business, and the manner in which [Telematrix] supplies products and services to its clients, including, but not limited to, sales, marketing and technical procedures, processes and techniques;
- (d) All documents and records furnished to or acquired by [Louden] as a result of [Louden's] employment by [Telematrix] and relating to [Telematrix's] business, including, but not limited to:
  - (1) Client information furnished to [Telematrix];
  - (2) The names, addresses, and business, financial and sales data pertinent to any client and any client lists and other client information;
  - (3) Names, addresses, and financial and purchase data pertinent to any of [Telematrix's] customers ...;

- (4) Files and records of any type whatsoever pertaining to [Telematrix's] business, including financial records, whether prepared by [Telematrix] or [Louden].

*Id.* at 36-37. In another part of the Agreement, Loudon acknowledged that during his employment with Telematrix, he was “provided access to ... Confidential Information”, *id.* at 37, and agreed that during the period of his employment or thereafter he would not “directly or indirectly, furnish or divulge any Confidential Information for any purpose whatsoever to any individual firm, partnership, limited liability, corporation, or other entity other than [Telematrix], nor utilize any Confidential Information for [Louden's] or a subsequent Employer's personal financial benefit or gain.” *Id.* Finally, Loudon “expressly acknowledge[d] the reasonableness” of the foregoing provisions and “further acknowledge[d] that such restrictions ... are necessary for the protection of [Telematrix's] Confidential Information, client relationships and accounts, trade secrets and goodwill.” *Id.* at 38.

In March 2004, Brian Esquire signed a document entitled Employee Confidentiality, Non-Disclosure, And Non-Use Agreement, which was substantially similar in all relevant respects to the Agreement signed by Loudon. Esquire was a 3D animator who was hired by Telematrix in 1996 and separated from Telematrix in the summer of 2005. During the almost nine years that Esquire worked for Telematrix, fifty to sixty percent of his work was done on the Cummins account, specifically the CVC work. In 2004, after Owens began working for Techcom, Mantyla met several times with Esquire and Adrienne Clodfelter, another Telematrix employee integral to the Cummins CVC account. It was Esquire's understanding

that Mantyla's initial plan after going to Techcom "was to get the Cummins work from Telematrix by bringing [Eslaire] and [Clodfelter] over [to Techcom]." *Id.* at 307.

All the while, commencing in late 2003, Mantyla persisted in attempting to persuade Loudon to leave Telematrix and work for Techcom. Mantyla's efforts to obtain the Cummins account culminated in Techcom's April 2005 "Cummins PowerCare Service Training and Information Convergence Project Resource Realignment Proposal (from Telematrix to Techcom)". *Id.* at 67-76. That proposal, in bullet-point form, stated, in relevant part, as follows:

- \* Techcom has been positioning itself to be Cummins' Convergence Project partner supplier for the past several years.
- \* The Cummins Virtual College team members at Telematrix would elect to follow this work if it is relocated.
  - \* \* \* \* \*
- \* The plan is to relocate the entire seven member Cummins virtual College team.
  - \* \* \* \* \*
- \* The former Telematrix Cummins Virtual College team members would move into Techcom's Post Road facility on the east side of Indianapolis.
  - \* \* \* \* \*
- \* Based on Telematrix's current relocation planning activities, internal discussions have suggested that a July 1<sup>st</sup> (2005) transition date would make sense.
- \* Techcom is prepared to react to this start date ... if a go-ahead decision could be reached fairly quickly.
- \* All critical skills and resources required to support the Convergence



Project would be in place at one partner supplier.

*Id.* at 67-74.

Mantyla presented the proposal to Crowel in May 2005. But before he did, Mantyla asked Loudon to review the presentation. Loudon did so and approved of its contents. On June 1, 2005, Mantyla submitted Techcom's declaration of intention to be considered as the supplier of CVC learning modules, outlining Techcom's specific plan. While he was working behind the scenes with Techcom toward obtaining the equipment and personnel that Techcom needed to assume the work that Telematrix was then currently performing for Cummins, Loudon did not divulge to Telematrix or MZD of the plan to take Telematrix's entire CVC team and largest account to Techcom. When asked about this later, Loudon admitted, "I knew they wouldn't like it, so I didn't, I didn't do it." *Id.* at 175.

On June 7, 2005, Loudon formally accepted a position with Techcom and submitted his letter of resignation the next day, June 8, to Throckmorton, stating that effective July 30, 2005, he would separate from Telematrix. On June 9, Loudon went to Techcom's facilities and gave several Telematrix employees a tour thereof. Loudon and Techcom owner Adams interviewed Esquire and at least two other Telematrix employees for positions with Techcom.

On June 10, Zuckerman informed Loudon that he was terminated effective immediately and instructed Throckmorton to march Loudon out of the building. Throckmorton did so. Also on June 10, Throckmorton met with Esquire and Clodfelter and informed them that he knew about their meetings with Mantyla. When Esquire acknowledged that he had interviewed with Mantyla, Throckmorton told them they needed "to get [their] story straight and slapped

some audio tapes down on his desk and ... said because if you stay you'll be okay and if you leave I can't guarantee [Zuckerman] won't sue both of you." *Transcript* at 304-05. Eslaire resigned from Telematrix that day and subsequently began working for Techcom.

In a letter dated June 20, 2005, Loudon wrote to Zukerman as follows:

This letter is to terminate my membership in Telematrix, LLC and to return my three percent Class B stock to the remaining shareholders.

Upon receiving the money remaining in my deferred compensation account of \$10,664 I will relinquish any rights to my ownership of Class B stock effective 01/01/05. Furthermore I acknowledge that I have no rights to any share of profits generated by Telematrix, LLC in the calendar year 2005.

I request that this transaction be completed by June 30, 2005.

*Plaintiff's Exhibit Binder*, Plaintiff's Exhibit 45. On June 22, Loudon provided Techcom's owners with a lead from Crowel about a prospective technical writer for Techcom. Also on that day Loudon sent an email to Crowel containing a cost quote for Techcom to perform certain work for Cummins, and closing with the following: "Thank you very much for the business. You have taken the first step in what we believe will be a bright and rosy future for both of our organizations." *Id.* at Plaintiff's Exhibit 48. On June 29, 2005, Loudon wrote to Becky Brici at Telematrix, answering questions she had posed regarding software that Loudon was ordering for Techcom.

On July 26, 2005, Loudon telephoned Telematrix employee Justin Arnett, a member of Telematrix's CVC team who had not gone to Techcom, with questions concerning two programs Telematrix had prepared for Cummins. Telematrix's Clodfelter responded, "I have been advised by management that none of the Telematrix staff is to be contacted by

employees of Techcom concerning the [CVC] or any business of our customers. The contact for any inquiries must be me or Jo. Please direct any future concerns directly to one of us.”

*Id.* at Exhibit 62. Notwithstanding Clodfelter’s instructions to the contrary, Loudon again attempted to contact Arnett about Telematrix’s work on the Cummins account. Clodfelter again responded on behalf of Telematrix, as follows:

Justin did receive your voicemail message today. However, he will not be able to respond to your request since all requests (regarding the [CVC] or any business of Telematrix customers) from the employees of Techcom need to go through the proper channels here at Telematrix. I have explained this informally. Now, I am in the position of asking you formally to put in writing all requests and direct those to either me or Jo. None of the Telematrix staff will respond to these requests except for me and Jo.

*Id.* at Exhibit 66. Finally, On October 19, 2005, Loudon and Telematrix entered into a Membership Interest Repurchase Agreement whereby Loudon sold his Telematrix membership interest to Telematrix for \$8531.20.

On December 27, 2005, Telematrix filed a six-count complaint for damages against Techcom, Mantyla, Loudon, Esquire, and Raymond Ford. Count I sought recovery from Loudon, Esquire, and Ford under the theory of breach of fiduciary duty; Count II sought recovery from all defendants under the theory of breach of the Uniform Trade Secrets Act, i.e., Ind. Code Ann. § 24-2-3-1 *et seq.* (West, PREMISE through 2008 2nd Regular Sess.); Count III sought recovery from all defendants under the theory of conversion; Count IV sought recovery from Loudon, Esquire, and Ford for breach of contract, pertaining to their employment agreements; Count V sought recovery from all defendants under the theory of tortious interference with business relationships; and Count VI sought recovery from

Techcom and Mantyla under the theory of tortious interference with contractual relationships with Telematrix employees. Telematrix sought compensatory and punitive damages, as well as costs and attorney fees.

The matter proceeded to trial on December 3-7, 2007 after the defendants' motion for partial summary judgment with respect to Counts II and III was denied. On February 14, 2008, the trial court issued its judgment accompanied by findings of fact and conclusion of law. The court entered judgment against Telematrix on Counts II (breach of Uniform Trade Secrets Act), III (conversion), IV (breach of contract), and VI (tortious interference with contractual relationships with Telematrix's employees). The court entered judgment in favor of Telematrix and against Loudon under Count I (breach of fiduciary duty) and in favor of Telematrix and against Techcom and Mantyla on Count V (tortious interference with business relationship). Techcom, Mantyla, and Loudon appeal the judgments against them. Further facts will be provided where relevant.

The Appellants appeal from a judgment accompanied by findings of fact and conclusions of law. Pursuant to Indiana Trial Rule 52(A), "[o]n appeal of claims tried by the court without a jury ... the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." When a trial court's judgment is accompanied by specific findings and conclusions, we apply a two-tiered standard of review. *Anthony v. Indiana Farmers Mut. Ins. Group*, 846 N.E.2d 248 (Ind. Ct. App. 2006). We construe the findings liberally in support of the judgment and first consider whether the evidence supports those

findings. *Id.* Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. *Id.* Next, we must determine whether the findings support the judgment. *Id.* A judgment is clearly erroneous when the findings of fact and conclusions thereon do not support it. *Id.* We will disturb the judgment only when there is no evidence supporting the findings or the findings fail to support the judgment. *Id.* In performing this review, we do not reweigh the evidence and consider only the evidence favorable to the trial court's judgment. *Id.*

The particular clearly erroneous standard to be used depends upon whether the party is appealing a negative or an adverse judgment. *Id.* In the instant case, Techcom, Mantyla, and Loudon appeal from an adverse judgment because they were defending against Telematrix's lawsuit and thus did not bear the burden of proof.

When the trial court enters findings in favor of the party bearing the burden of proof, the findings are clearly erroneous if they are not supported by substantial evidence of probative value. Moreover, we will reverse such a judgment even where we find substantial supporting evidence, if we are left with a definite and firm conviction a mistake has been made.

*Id.* at 252 (quoting *Romine v. Gagle*, 782 N.E.2d 369, 376 (Ind. Ct. App. 2003), *trans. denied*).

1.

Louden contends the trial court's determination that he breached his fiduciary duty to Telematrix is clearly erroneous. Loudon acknowledges "it is without question that [he] owed a fiduciary duty to Telematrix." *Appellant's Brief* at 23. He contends, however, that obligation terminated with his separation from Telematrix on June 10, 2005. Moreover, he

contends, “Techcom received no immediate benefit from Loudén’s association.” *Id.*

We begin with the nature of Loudén’s duty to Telematrix as a member of the LLC. In *Purcell v. Southern Hills Invs., LLC*, 847 N.E.2d 991, 997 (Ind. Ct. App. 2006), we concluded “common law fiduciary duties, similar to the ones imposed on partnerships and closely-held corporations, are applicable to Indiana LLCs.” In the same case, we specified the nature of that duty, again drawing upon the example of a closely held corporation, i.e., “the fiduciary must deal fairly, honestly, and openly with his corporation and fellow stockholders. He must not be distracted from the performance of his official duties by personal interests.” *Id.* (quoting *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 227 (Ind. 2001)). The foregoing aptly sums up the nature of Loudén’s duty to Telematrix as a member of the LLC. Did the trial court commit clear error in determining that he breached that duty? We conclude that it did not.

The record is replete with instances in which Loudén’s conduct while undeniably still a member of Telematrix constituted a breach of his fiduciary duty to the LLC. By April of 2005, Loudén had already agreed in principle to move to Techcom after it obtained the contract to do the work that was at that time being done by Telematrix. Loudén had already reviewed and approved the proposal Mantyla would use to pitch his bid to Cummins for Techcom to take over the work then being done by Telematrix. In fact, when Zuckerman contacted Loudén on May 12, 2005 about Throckmorton’s concern that Techcom was attempting to get the Cummins account, Loudén’s response failed to apprise Zuckerman about what Loudén knew Techcom was doing, and certainly did not inform Zuckerman of the

integral part he (Louden) was playing in that takeover attempt. We understand that the Appellants contend any actions in breach of his fiduciary duty committed by Louden before June 10, 2005 caused no damages. We agree with the trial court, however, for reasons amply explained elsewhere, that Louden's actions on behalf of Techcom before June 10, 2005 were instrumental in causing Cummins to switch from Telematrix to Techcom at that time, and earlier than would otherwise have happened. Therefore, the trial court's determination that Louden breached his fiduciary duty to Telematrix is not clearly erroneous.

2.

Mantyla and Techcom contend the trial court's conclusion that they tortiously interfered with Telematrix's business relationship with Cummins is clearly erroneous. In order to prevail upon a claim of tortious interference with a business relationship on the facts of this case, it was incumbent upon Telematrix to prove the following elements: (1) The existence of a valid business relationship between Telematrix and Cummins; (2) the Appellants' knowledge of the existence of that relationship; (3) the Appellants' intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from the Appellants' wrongful interference with that relationship. *See Baker v. Tremco Inc.*, 890 N.E.2d 73 (Ind. App. Ct. 2008). In addition, our Supreme Court has added what amounts to a sixth element: "this tort requires some independent illegal action." *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 291 (Ind. 2003). Mantyla and Techcom contend Telematrix has failed to prove elements (4), (5), and (6), i.e., that the actions in questions lacked justification, that Telematrix suffered damages as a result of those

actions, and that Mantyla and Techcom acted illegally.

This court has turned to the Restatement (Second) of Torts § 768 (1977) for assistance concerning the element of justification in the context of competitors in business. *See Rice v. Hulsey*, 829 N.E.2d 87 (Ind. Ct. App. 2005). This section provides as follows:

§ 768 Competition as Proper or Improper Interference

(1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if

(a) the relation concerns a matter involved in the competition between the actor and the other and

(b) the actor does not employ wrongful means and

(c) his action does not create or continue an unlawful restraint on trade and

(d) his purpose is at least in part to advance his interest in competing with the other.

(2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

Pursuant to the foregoing provision, Mantyla and Techcom cannot be liable on a theory of tortious interference with a business relationship if conditions (a) through (d) are present. Clearly, the subject of this lawsuit concerns a matter involving the competition between Techcom and Telematrix. Just as clearly, this matter does not involve a restraint of trade. Also, Mantyla and Techcom's common purpose was to advance Techcom's interest in competing against Telematrix. This leaves the question of whether Mantyla and Techcom



“employed wrongful means” within the meaning of subsection (1)(b) of § 768.

Beginning in late 2003, and continuing through and including June of 2005, Mantyla, on behalf of Techcom, actively sought to induce Loudon, as well as other employees of Telematrix, to work for Techcom instead. The mere effort to lure a competitor’s employees away is not, in and of itself, “wrongful means” within the meaning of subsection (1)(b). In Loudon’s case, however, commencing sometime in early 2005, Mantyla’s efforts went beyond merely attempting to woo Loudon to Techcom; he induced Loudon’s active participation in Techcom’s efforts to wrest the Cummins account away from Telematrix. As set out above, Mantyla asked Loudon to review Techcom’s presentation to Crowel and Cummins sometime before it was presented in May 2005. At that time, Loudon was not only Telematrix’s Vice President of Operations, but he also was a member of the LLC and thereby owed a fiduciary duty to Telematrix. Mantyla cannot plausibly argue that he did not know of Loudon’s position with Telematrix and the fact that Loudon was a member of the LLC at the time. As such, he was complicit in Loudon’s wrongdoing, and thus employed “wrongful means” within the meaning of § 768(1)(b) in securing the Cummins CVC account for Techcom. As a result, the actions were not justified within the meaning of *Baker v. Tremco, Inc.*, 890 N.E.2d 73.

The Appellants contend that Telematrix suffered no damages as a result of their activities, essentially because the Cummins CVC work was acquired via bid on a job-by-job basis, and thus there was no guarantee that Telematrix would be awarded that contract any time after the spring of 2005. As we will explain more fully below in our resolution of Issue

3, we conclude that the trial court did not commit clear error in determining that the complained-of actions resulted in Telematrix wrongfully losing the account for the second half of 2005.

Mantyla and Techcom next contend that Telematrix failed to prove that Mantyla and Techcom acted illegally – the sixth element of the tort of tortious interference with a business relationship. On the facts of this case, this element is satisfied by the same evidence that established the absence of justification as explained above. As Mantyla and Techcom acknowledge, “‘Illegally’ in this context does not necessarily mean criminally, but instead wrongfully as in breach of a contractual or common law duty.” *Appellants’ Appendix* at 30 (citing *Econovation, Inc. v. Automated Conveyor Sys., Inc.*, 694 F.Supp. 553 (S.D. Ind. 1988)). Mantyla and Techcom argue that mere breach of contract alone is not sufficient to satisfy this requirement. Moreover, they contend, this element certainly cannot be met where there is *no* breach of contract or breach of statutory or common law duty. We think this overly narrows the scope of what may constitute an illegal act in this context. It appears that Mantyla and Techcom contend there must be some type of formal relationship between the allegedly interfering party and the aggrieved party such as to give rise to a duty in contract, at common law, or a duty arising by statute. To the contrary, the illegal conduct is not necessarily a function of the legal relationship between the aggrieved party and the accused party. In fact, it is much more a function of the legal relationship between the aggrieved party and the third party that it alleges the accused party interfered with. Although it is helpful to know that “illegal” in this context is not to be understood as synonymous with

“criminal”, we must seek an affirmative description of “illegal conduct” in order to decide whether Mantyla’s actions in this case satisfied this requirement.

We agree with the Appellants that it means something akin to “wrongfully” as that term is used in a breach-of-contract analysis. *See Econovation, Inc. v. Automated Conveyor Sys., Inc.*, 694 F.Supp. 553. We further believe that it suggests a mental element that goes beyond mere negligence and includes intentional conduct that is plainly and demonstrably unprincipled, i.e., unscrupulous behavior based upon prevailing societal and business standards of morality and ethics. For purposes of this case, we need not explore the outer boundaries of the kinds of behavior that fall within this definition. It is enough to state our conclusion that Techcom and Mantyla’s actions in the instant case easily fall within them. To review, Mantyla induced Loudon to breach his fiduciary duty to Telematrix in helping Techcom lure Cummins’s business away from Telematrix. Moreover, in so doing, Mantyla falsely indicated to Cummins in his May 2005 presentation that Techcom already had secured formal commitments from Loudon and Esquire to join Techcom. Although Loudon by then had breached his fiduciary duty to Telematrix, his formal commitment to join Techcom would come later. We hold that in inducing Loudon to breach his fiduciary duty to Telematrix, and in misrepresenting the nature of Loudon’s relationship with Techcom at the time, Mantyla and Techcom acted “illegally” within the meaning of the elements of tortious interference with a business relationship.

In light of the foregoing discussion, the trial court’s conclusion that Mantyla and Techcom tortiously interfered with Telematrix’s business relationship with Cummins is not

clearly erroneous.

3.

The Appellants contend the trial court erred in awarding \$152,577.17 in damages to Telematrix. The trial court awarded damages as follows:

22. The impact of Defendants' conduct on Telematrix was immediate.
23. Tom Owens, a close friend of Defendants Mantyla and Loudon, testified that he had repeatedly tried to purchase Telematrix from MZD because Telematrix was profitable.
24. However, the evidence and all reasonable inferences, shows [sic] that the Cummins account may have eventually transferred to Techcom, even in the absence of the actions of Techcom, Mantyla, and Loudon.
25. The evidence, and all reasonable inferences, shows [sic] that Telematrix should only be entitled to damages for loss of Cummins account for the last half of 2005.
26. According to Plaintiff's Exhibit 103 (page 3), Telematrix's gross billings from the Cummins [sic] in the first half of 2005, at the time it lost the account, totaled \$651,666.
27. According to Plaintiff's Exhibit 103 (page 8), Telematrix's 10-year average of net income as a percent of gross billings, at the time it lost the account, was 5.54%.
28. Accordingly, Plaintiff was damaged in the amount of \$36,102.30 for the loss of Cummins business for the last half of 2005.
29. Telematrix clearly suffered a loss of business goodwill in the amount of \$100,000.
30. According to Plaintiff's Exhibit (page 5), Telematrix [sic] loss from rent and utility costs, at the time it lost the account for the last half of 2005, is \$16,474.87.
31. Telematrix is entitled to total damages from Techcom, Mantyla, and Loudon in the amount of \$152,577.17.

*Appellants' Appendix* at 318-19. Apart from the claim that Telematrix failed to prove the elements of the theories upon which its complaint was based, which we have already affirmed, the Appellants' remaining challenge to the damages award is essentially that it is too speculative.

The first component of the Appellants' argument in this respect is that Telematrix was not entitled to damages because "Cummins and Telematrix worked on a per project basis; Cummins made no guarantee for future work to Telematrix; therefore, there could be no damage as to supposed future lost work from Cummins' account." *Appellants' Brief* at 27. Therefore, according to the Appellants, the award could not be squared with the trial court's finding that Techcom may have eventually acquired the Cummins account even without the actions of Techcom, Mantyla, and Loudon that are the subject of this lawsuit. To the contrary, we find the two conclusions consistent with one another.

The trial court correctly noted that Cummins was not contractually bound to hire Telematrix to perform its CVC services beyond the current job. As noted, the work was bid out on a job-by-job basis. It is precisely for this reason that the trial court did not award damages in the amount of lost profits beyond the current year. This means, of course, that the trial court's award was based upon its conclusion that Telematrix would have been awarded the current job but for the Appellants' actions. This conclusion is supported by evidence that Telematrix had been doing Cummins's CVC work for many years, and that Cummins informed Mantyla in May 2005 that Cummins was concerned about Techcom's ability to perform the work in question and Cummins at that time "had no issues" with

Telematrix, which was currently performing the work for Cummins. *Appellee's Appendix* at 82. It is reasonable to infer that had Mantyla and Techcom not induced Loudon to breach his fiduciary duty to Telematrix, Telematrix, not Techcom, would have secured the bid to supply Cummins's CVC work for the second half of 2005.

Accepting the foregoing as correct, the calculation of damages flowing therefrom was set out in Paragraphs 26-28 of the findings of fact, as set out above. There is evidence to support the findings with respect to Telematrix's profits for the first half of 2005 and its profitability over the preceding ten years, expressed in terms of a percentage of its gross income. Therefore, the trial court's conclusion that Telematrix was entitled to damages of \$36,102.30 for lost profits for the second half of 2005 is supported by substantial evidence of probative value and is not clearly erroneous. *See Anthony v. Indiana Farmers Mut. Ins. Group*, 846 N.E.2d 248.

The trial court also determined that Telematrix was entitled to damages from rent and utility costs in the amount of \$16,474.87. This figure was drawn from evidence submitted by expert witness Tom Conrad, a certified public accountant. In arriving at these figures, Conrad determined the square footage of office space at Telematrix's facilities dedicated to the Cummins work divided by the total square footage of the facilities. This yielded a figure of 18.15%, meaning 18.15 % of Telematrix's facilities which would have had been dedicated to Cummins's work was left empty and unused as a result of Mantyla and Techcom's tortious interference with contract. The precise damages amount in this category was the product of that percentage times the total rent for the second half of 2005, plus that percentage times the

total utilities paid for the second half of 2005. Mantyla and Techcom contend this aspect of the award is too speculative and is not supported by a “compensable cause of action.” *Appellants’ Brief* at 29.

Beginning with the latter claim, we have affirmed the trial court’s ruling that Telematrix established all the elements of tortious interference with a business relationship, and that cause of action supports the award. As to the former claim, we conclude that the amount is not speculative. As indicated above, the amount was the product of the fraction of Telematrix’s facilities dedicated to the lost account times the total utilities and rent paid over the relevant period of time. This aspect of the award was not clearly erroneous.

Finally, we consider Mantyla and Techcom’s argument that the trial court erred in awarding damages for loss of good will. They claim, as before with respect to damages for lost rent and utilities, that this award is too speculative. Labeling Telematrix’s claim of damages pertaining to loss of good will as “wishful”, *Appellants’ Brief* at 7, Mantyla and Techcom contend that Conrad and Zuckerman “admitted the number had been pulled out of thin air.” *Reply Brief of Appellants* at 7. This aspect of the award is more solidly grounded than that.

Goodwill has been defined as “the probability that old customers of the firm will resort to the old place of business where it is well-established, well-known, and enjoys the fixed and favorable consideration of its customers” or “the expectation of continued public patronage.” *Rice v. Hulsey*, 829 N.E.2d at 90 (quoting *Berger v. Berger*, 648 N.E.2d 378, 383 (Ind. Ct. App. 1995)). It may be measured by considering the earning power of the

business. *Cf. Western Assur. Co., Inc. v. Connors*, 101 F.Supp.2d 1111, 1128 n.24 (S.D. Ind. 1999); *see also Fogle v. Shah*, 539 N.E.2d 500, 502 (Ind. Ct. App. 1989) (“[t]he goodwill of a business is an intangible asset which may be transferred from seller to Purchaser, and it becomes the buyer’s right to expect the firm’s established customers will continue to patronize the purchased business”). Documents submitted in evidence in the instant case reflect that Telematrix’s annual profits totaled approximately \$100,000. This was contrasted with evidence showing that, following the loss of its employees and the Cummins account to Techcom, Telematrix was not profitable.

We conclude that the findings of the court with respect to damages are supported by substantial evidence of probative value and therefore that the awards based thereon are not clearly erroneous. *See Anthony v. Indiana Farmers Mut. Ins. Group*, 846 N.E.2d 248.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur.